SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK **PART** IAS MOTION 53EFM

Justice

----------X

ALLOY ADVISORY, LLC

Plaintiff,

- v -

503 WEST 33RD STREET

Defendant.

----------X

INDEX NO. 654753/2017

MOTION DATE 11/25/2019, 11/25/2019

MOTION SEQ. NO. 004 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 122, 123, 124, 125, 126, 127, 128, 129, 161, 163, 165, 166, 167, 168, 169, 170, 171, 172, 173, 181, 182, 183

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 162, 164, 174, 175, 176, 177, 179, 180

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

Upon the foregoing documents, (i) Alloy Advisory, LLC and Jared Della Valle's (collectively, the **Plaintiffs**) motion for summary judgment (Mtn. Seq. No. 004) for wrongful termination (first cause of action) is granted in part as set forth herein, and (ii) 503 West 33rd Street Associates, Inc. and William A. Dalessandro's (collectively, the **Defendants**) motion for summary judgment dismissing the complaint (Mtn. Seq. No. 005) is granted solely to the extent that the third (breach of the implied covenant of good faith and fair dealing), fourth (unjust enrichment), fifth (quantum meruit), and sixth (promissory estoppel) causes of action, and all claims against Mr. Dalessandro, personally, are dismissed.

The Relevant Facts and Circumstances

The facts in this case are straightforward and involve the Related Companies, LP (the **Designated Purchaser**) assemblage of properties in its development of the Hudson Yards. In short, the instant matter involves a dispute between 503 West 33rd Street Associates, Inc. (**503 West**), which owned 503-505 West 33rd Street, New York, New York (the **Property**) and the Plaintiffs, who were retained to advise and represent 503 West in its negotiations with the Designated Purchaser in connection with the sale of the Property.

More specifically, 503 West was interested in selling the Property to the Designated Purchaser. Mr. Dalessandro, the President of 503 West (NYSCEF Doc. No. 150, ¶ 1) met Mr. Della Valle in 2013 (NYSCEF Doc. No. 166 at 112) and, although the Agreement (hereinafter defined) was not executed until October of 2014, engaged him to advise and assist in the negotiations with the Designated Purchaser (*id.* at 116-117). Among other things, prior to the execution of the Agreement, Mr. Della Valle helped put together a non-binding letter of intent (the **2014 LOI**; NYSCEF Doc. No. 175), dated September 15, 2014, from 503 West to the Designated Purchaser, whereby 503 West outlined certain terms and conditions regarding further negotiations for the sale of the Property, including significantly, that the sale would be a 1031 tax free exchange. To wit, the 2014 LOI provided:

> The conveyance of the Properties and delivery of the Purchase Price shall take place upon sixty (60) days notice from [503 West] but in no instance shall occur later than the date, which is twenty four (24) months from the date of the Agreement. ***At [Related's] sole cost and expense, [Related] will cooperate with [503 West] for purposes of making one or more 1031 Exchanges or similar transactions.***

(*id.* at 1 [emphasis added]).

Soon thereafter, the parties entered into a certain Non-Exclusive Broker's Agreement (the **Original Agreement**), dated October 23, 2014, by and between 503 West as "Seller" and the Plaintiffs as "Broker" pursuant to which 503 West retained the Plaintiffs "***to advise*** [503 West] with respect to the Sale Transaction to the Designated Purchaser, including ***aiding*** [503 West] to negotiate various deal parameters, term sheets and other required or reasonably required documents for the Sale Transaction" (NYSCEF Doc. No. 104 at 1 [emphasis added]) for a term scheduled to expire on September 30, 2015, which Original Agreement was amended by an Amendment to Non-Exclusive Broker's Agreement (the **Amendment;** the Original Agreement as amended by the Amendment, hereinafter, the **Agreement**; NYSCEF Doc. Nos. 104 and 105), dated October 1, 2015, by and between 503 West and the Plaintiffs, pursuant to which the term was extended until September 30, 2016. For clarity, this was not a general brokerage agreement whereby the broker is retained to market the property generally and to find a ready, willing and able buyer. This was a specific engagement for assistance with a ***single prospective purchaser*** – i.e., the Designated Purchaser.

Pursuant to Section 3 of the Agreement, the Plaintiffs would be paid a commission in accordance with the Commission Schedule attached as **Exhibit A** to the Agreement if a written and binding contract for the Property was entered into between 503 West and the Designated Purchaser on or before the expiration of the term of the Agreement, the closing occurred in accordance with the terms of the Agreement and a Termination Event (as defined in the Agreement) had not occurred prior to the closing (NYSCEF Doc. No. 3, § 3 [a]). If, however, a contract was not entered into for any reason whatsoever including the willful default of 503 West before the Agreement expired, the Plaintiffs would not receive a commission (*id.*, § 4). Notwithstanding the foregoing,

if a binding Letter of Intent, term sheet or other similar agreement was executed prior to September 30, 2015, and the term of the Agreement was not extended, and a closing occurred prior to January 31, 2019, then the Plaintiffs were to receive a half commission of the commission they would have received if the term of the Agreement had been extended (*id.)*. As is customary, 503 West retained the right to determine any and all of the terms of the transaction and the right to refuse to consummate any contract for the Property for any reason, provided however, as set forth in the Agreement "certain actions including Seller's refusal to consummate the sale pursuant to the Contract shall result in [503 West] incurring an obligation to [the Plaintiffs] for the payment of the Commission, fee or other compensation" (*id.,* § 5). For completeness, the Agreement does not expressly include language requiring a threshold level of participation by the Plaintiffs for the Plaintiffs to earn a commission (e.g., attendance at a certain number of meetings or a certain number of phone calls or that the Plaintiffs be the "procuring cause" in the consummation of a transaction).

During the term of the Agreement and for the period of 2 years after its expiration, the Plaintiffs were required to not disclose "Confidential Information," which was defined as:

> … all nonpublic information of Seller including, without limitation, strategic, financial and marketing plans, pricing, sales, business process and practices, trade secrets, financial information, tenants and shareholder lists, as well as all other information, offers and data provided to the Designated Purchaser relating to the potential sale of the Property and Contract and such further information that a reasonable person would understand to be confidential, based upon the nature of such information, whether or not so marked …

(*id.*, § 11).

Finally, the Agreement provided that 503 West could terminate the Agreement at any time upon the occurrence of a "Termination Event." To wit, Section 1 of the Agreement provided that

> … Seller may terminate this Agreement at any time upon the occurrence of any of the following (a "**Termination Event**"): ***(a) Broker fails to comply with any term, provision, covenant or agreement hereunder and such failure continues for ten (10) days after written notice from Seller. indicating the specifics of the failure to comply and the requested remedy***, (b) JDV is unable to provide his services for fifteen (15) or more days after written notice from Seller, (c) Broker ceases to conduct its business in the ordinary course, (d) Broker makes an assignment for benefit of creditors, and/or (e) Broker voluntarily files or has filed against it involuntarily a petition under any bankruptcy or insolvency law or a trustee, receiver or liquidator is appointed for all or a substantial part of its assets.

(*id.*, § 1 [emphasis added]).

During the term of the Agreement, Mr. Della Valle both advised Mr. Dalessandro and negotiated with the Designated Purchaser as to the sale of the Property, including participating in phone calls and emails regarding the potential sale of the Property (NYSCEF Doc. No. 166 at 67-69). By way of example, by (i) emails, dated October 12, 2015, Mr. Della Valle advised Mr. Dalessandro that the Designated Purchaser would shortly provide a counter-offer "defined by condominiums," which meant an "offer that trades [503 West's] property for condos in the future as discussed" (the **October 2015 Emails**; NYSCEF Doc. No. 168 at 5-6) and (ii) by email, dated January 12, 2016, Mr. Della Valle further wrote to Mr. Dalessandro that the Designated Purchaser could "come calling soon" (NYSCEF Doc. No. 106).

For his part, Mr. Dalessandro alleges that he believed that Mr. Della Valle was in breach of the Agreement. By email, dated October 13, 2015, Mr. Dalessandro separately advised a non-party that Mr. Della Valle promoted his own interests to the detriment of Mr. Dalessandro "[i]n blatant disregard of [Mr. Dalessandro's] instructions" by putting out the best offer to the Designated Purchaser (NYSCEF Doc. No. 168 at 3). However, to the extent that Mr. Dalessandro was dissatisfied with the Plaintiffs performance, it is undisputed that he did not send out a termination

notice identifying how Plaintiffs allegedly failed to comply with the Agreement and identifying the requested remedy as required by the express terms of the Agreement described above. Instead, by email, dated January 12, 2016, Mr. Dalessandro threatened the Plaintiff:

> … You have two choices: Terminate the contract, or Face 5 years of litigation with me. I am prepared to spend $1,000,000, or more, to prove that you have not been dealing in my best interests. And, I will also pursue damages. ***In any event. [sic] you no longer have the right to represent me or deal with The Related Companies on my behalf.***

(the **Termination Email**; NYSCEF Doc. No. 107 [emphasis added]).

When Mr. Della Valle responded by email, dated January 13, 2016, that Mr. Dalessandro identify a termination event pursuant to the Agreement (NYSCEF Doc. No. 108), Mr. Dalessandro replied on the same date advising Mr. Della Valle: "[d]o not attempt to contact me, for any reason. Direct any communications to my attorney …" (the **Do Not Contact Me Email**; *id.*). Sometime thereafter in 2016, the Defendants sold the Property to the Designated Purchaser for $60,580,000.

The Plaintiffs commenced this action on July 12, 2017 for (i) breach of contract, (ii) breach of the implied covenant of good faith and fair dealing, (iii) unjust enrichment, (iv) quantum meruit, (v) fraudulent inducement, and (vi) attorneys' fees (NYSCEF Doc. No. 2). The Defendants moved to dismiss the Complaint in its entirety. The court (Ramos J.) denied the motion to dismiss on the record after oral argument (*2/6/2018 Tr.*, NYSCEF Doc. No. 41). Although the court remarked that "[Defendants] terminated [Plaintiffs] right to negotiate this deal in January of 2016 … When your client did that he basically threw away his defense in this case because the broker was entitled to try to make this deal fall into the terms of the agreement that he had with your client up until the end of I guess September of 2016," the motion was ultimately denied

because there were issues of fact to resolve in discovery (*id.* at 3-4, 11). On August 17, 2018, the Plaintiffs moved for summary judgment, which motion was denied on the record following oral argument (*10/18/2018 Tr.*, NYSCEF Doc. No. 84) because damages could not be determined absent discovery as the Plaintiffs had to prove that they were "a procuring cause of the deal" (*id.* at 18-20).

On March 26, 2019, the Plaintiffs filed an Amended Complaint (NYSCEF Doc. No. 102) alleging the following causes of action: (i) breach of contract for wrongful termination, (ii) anticipatory breach, (iii) breach of the implied covenant of good faith and fair dealing, (iv) unjust enrichment, (v) quantum meruit, (vi) promissory estoppel, and (vii) attorneys' fees. On April 15, 2019, the Defendants filed their amended answer with a counterclaim for attorneys' fees pursuant to the Agreement (NYSCEF Doc. No. 112). Following the close of discovery, the instant motions were filed.

Discussion

On a motion for summary judgment, the movant "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing is made, the burden shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of a triable issue of fact (*Zuckerman v New York*, 49 NY2d 557, 562 [1980]).

I. Motion Sequence 004 (Plaintiffs' Motion for Summary Judgment)

The elements of a claim for breach of contract are (1) the existence of a contract, (2) the plaintiff's performance, (3) the defendant's breach and (4) resulting damages (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]).

A. Existence of the Agreement and Performance of the Agreement

It is beyond question that the Agreement is a valid contract (NYSCEF Doc. No. 104), and that the Plaintiffs performed services pursuant to the terms of the Agreement. By way of example, Section 2 of the Agreement provided that the Plaintiffs would perform certain services for the Defendants, including "[a]ttending meetings, participating in conference calls, and preparing offers and term sheets … and such other reasonable services as customarily performed by a 'commercial broker'" (*id.*, ¶ 2). The record reflects that Mr. Della Valle exchanged a term sheet, had phone calls, and exchanged various emails with the Designated Purchaser and updated Mr. Dalessandro in connection with the same (NYSCEF Doc. No. 166 at 62-63, 67-70; NYSCEF Doc. No. 167 at 123-125, 128).

B. Breach of the Agreement

The Plaintiffs argue that the Defendants breached the Agreement by wrongfully terminating the Agreement pursuant to the Termination Email, which prevented the Plaintiffs from further performing under the Agreement and without complying with the terms of the Agreement for termination. In their opposition papers, the Defendants argue that the Termination Email did not terminate the Agreement, and in any event, that termination without notice was justified because

the Plaintiffs' breached the Agreement by disclosing the Defendants' confidential negotiation strategy. The Defendants' arguments ring hollow.

It is beyond cavil that the Termination Email effectively terminated the Agreement. The Plaintiffs were hired for one purpose – i.e., to advise and negotiate a deal with the Designated Purchaser. When Mr. Dalessandro prohibited the Plaintiffs from representing him or dealing with the Designated Purchaser, the Agreement was terminated. Period. Full Stop. There was no one else that the Plaintiffs were otherwise authorized to sell the Property to as the Agreement only authorized their involvement in procuring a deal with the Designated Purchaser. If the Termination Email alone did not make it clear, the subsequent Do Not Contact Me Email did. Furthermore, notwithstanding Mr. Della Valle's subsequent request that a termination event be identified pursuant to the Agreement, and that he potentially be given the opportunity to cure if the basis for the termination was his alleged breach as Mr. Dalessandro now alleges, he was unequivocally deprived of his ability to do this.

The Defendants fail to raise a material issue of fact as to whether they were entitled to terminate the Agreement without notice. It is well settled that if a contract provides for a notice and cure period, the non-defaulting party must generally provide the defaulting party with an opportunity to cure before taking steps to terminate the contract (*Sea Tow Servs. Intl. v Pontin*, 607 F Supp 2d 378, 388 [EDNY 2009]).

Notice may not be required where the defaulting party's alleged conduct constitutes an incurable breach (*id.* at 389, 390-391, citing *1537 Assoc. v Temlex Indus., Inc.*, 128 AD2d 384, 386 [1st

Dept 1987]). The Defendants rely on *1537 Associates* to argue that they could terminate the Plaintiffs without notice because the Plaintiffs allegedly disclosed the Defendants' confidential negotiation strategy to the Designated Purchaser in or around October 2015, which rendered notice and an opportunity to cure futile.

In *1537 Associates*, the defendant-tenant moved to dismiss the complaint, in part, because of the plaintiff-landlord's failure to serve a five-day notice to cure as a prerequisite to commencing the action. The plaintiff-landlord cross-moved for summary judgment on liability because the defendant-tenant failed to obtain written consent to sublet a portion of the premises. The parties' lease required the tenant to request and obtain the landlord's prior written consent to sublet any portion of the premises and provided the landlord certain options in the event of a sublet, including the payment of additional rent (*id.* at 384). The lease also provided that the landlord was required to identify and provide five days written notice for any purported default, other than a covenant for the payment of additional rent, and if the tenant failed to remedy such default, the landlord could serve three days written notice of cancellation of the lease (*id.* at 384-385).

The First Department held that the plaintiff-landlord's failure to serve a notice to cure did not bar its action for damages regarding the defendant-tenant's withholding of property pursuant to the RPAPL as the complaint stated a cause of action for the value of the use and occupancy of the sublet areas or damages under paragraph 41 of the lease which provided for payment of additional rent if the landlord failed to exercise its option concerning a proposed sublease (*id.* at 385-386). Further, the lease did not require any notice of default in fulfilling a covenant for payment of additional rent (*id.*). Notably, the First Department agreed with the defendant-

tenant's argument that the cause of action for recovery of possession of the premises was logically inconsistent with the cause of action for damages based on ratification of the alleged subleases such that the plaintiff-landlord had to make an election of remedies before trial (*id.* at 386). The Court held that the complaint adequately stated an action for recovery of possession of premises because a written notice of termination was served four days after the plaintiff-landlord discovered the sublets (*id.*). However, there were triable issues of fact as to whether the letter served as a notice to cure or whether a notice was not required because the defendant-tenant's alleged default and wrongful course of conduct constituted an incurable breach (*id.*). In other words, the defendant-tenant in *1537 Associates* attempted to take advantage of the plaintiff-landlord's failure to give notice and an opportunity to cure, which was rejected by the First Department.

In contrast, here, the Defendants attempt to circumvent the Agreement by not following the agreed upon procedure for termination – i.e., where termination is based on an alleged breach of the agreement, notice and a 10 day opportunity to cure – and instead, argue that they should be relieved of their obligation to do so because notice of termination would have been futile. This is, at best, disingenuous.

To the extent that the Agreement prohibited the Plaintiffs from disclosing "Confidential Information," such as "all non-public information of [Defendants] including, without limitation, strategic, financial and marketing plans, pricing, sales … provided to [the Designated Purchaser] relating to the potential sale of the Property" (NYSCEF Doc. No. 104, ¶ 11), the Defendants' alleged negotiation strategy cannot be said to be confidential because it was already disclosed

one year before the October 2015 Emails that led up to the Defendants' improper termination of the Agreement. Significantly, the 2014 LOI provided that "Related will cooperate with [503 West] for purposes of making one or more 1031 Exchanges or similar transactions" (NYSCEF Doc. No. 175). As a result, the fact that the Defendants might incorporate a 1031 exchange as part of the sale of the Property was simply not "Confidential Information" when this was already made known to the Designated Purchaser in the 2014 LOI.

Further, the Defendants fail to adduce any evidence that indicates the Plaintiffs even disclosed the Defendants' negotiation strategy to the Designated Purchaser – i.e., that the Defendants would accept condominiums instead of cash in exchange for the Property. In the October 2015 Emails, Mr. Della Valle advised Mr. Dalessandro that the Designated Purchaser would make an "offer that trades you your property for condos in the future as discussed" (NYSCEF Doc. No. 168, at 5). Although Mr. Dalessandro asserts that this purported offer from the Designated Purchaser could only mean that Mr. Della Valle disregarded Mr. Dalessandro's instructions to negotiate for a cash purchase price, the Defendants do not provide any correspondence or testimony that verifies Mr. Dalessandro's self-serving theory that Mr. Della Valle's email ***to Mr. Dalessandro*** necessarily means that, *ipso facto*, he revealed an allegedly confidential negotiation strategy to the Designated Purchaser such that termination of the Agreement without notice was warranted (NYSCEF Doc. No. 168 at 1; NYSCEF Doc. No. 167, at 141-146). In addition, and for the avoidance of doubt, to the extent that Mr. Dalessandro indicates that his confidential strategy also included being the "last man standing" – i.e., the last property owner to sell to the Designated Purchaser as he could therefore get the highest price – it is questionable as to whether this qualifies as Confidential Information (no expert opinion is offered to support that this is the

type of information that is not generally accepted in any business sale strategy to a developer assembling property) and, in any event, the record is bereft of any indication whatsoever that this confidential negotiating strategy was in any way communicated or that Mr. Dalessandro was not the last man standing in any event as the record indicates that 503 West may have been the last of the three relevant properties acquired (i.e., after both the Coach and McDonalds properties). To wit, Jay Cross, President of Hudson Yards, attested at his deposition:

> Q. What was your role in acquiring the parcels for the Hudson Yards development?
>
> Mr. MONTCLARE: Objection as to form. It's a cumulative question. He mentioned three difference parcels. So object as to form.
>
> A. It varied depending on which parcel. So I was heavily involved in the acquisition of the Coach parcel. I was not particularly involved in the acquisition of the project office. I pursued McDonald's for a long time because we were always chasing the appropriate executive, and McDonald's was changing, so it was difficult to -- you know, it was a changing cast of characters at McDonald's. And so I wasn't particularly involved in the last transaction.
>
> Q. By the last transaction, do you mean 503 West 33rd?
>
> A. I believe so, if I understand what you mean by 503. I just don't have a site plan in front of me.
>
> . . .
>
> A. Well, there was a period of time when I was meeting with Mr. Della Valle where we were interested in pursuing all the pieces on the block, but we weren't getting anywhere with McDonald's. And so we kind of put everything on hold and worried about our other, you know, priorities at that time.

(NYSCEF Doc. No. 171 at 16:3-25, 27:15-21).

During his deposition, Bruce Bartell, a real estate broker who also worked with Mr. Dalessandro attested that:

> Because they went one by one trying to put together this assemblage. I worked with [Mr. Dalessandro] trying to do something with Krickellas next door and then they got taken out by Related and McDonald's, and [Mr. Dalessandro] was the only one left.

(NYSCEF Doc. No. 172 at 30:24-31:5).

Finally, inasmuch as there is simply no evidence to support the notion of breach, it may very well have been that Mr. Dalessandro simply got upset with Mr. Della Valle because he perceived that Mr. Della Valle, in trying to negotiate a deal, was pushing harder to try to get Mr. Dalessandro to agree to the Designated Purchaser's terms rather than the other way around. To wit, Mr. Bartell explained his understanding of the negotiating process as follows:

> A. Well, I'm not sure what I thought then. My guess is [Mr. Dalessandro] thought that [Mr. Della Valle] was working -- trying to -- more trying to get [Mr. Dalessandro] to do what Related wanted than trying to get Related to do what [Mr. Dalessandro] wanted.

(*id.* at 40:5-9).

Equally problematic as it relates to this contention is that even if this had been disclosed, if the terms of a proposed deal were not acceptable to Mr. Dalessandro, 503 West had no obligation to enter into any contract with the Designated Purchaser. Put another way, there is no evidence that that this was confidential, that there was a breach by Mr. Della Valle, that at the time of any alleged but unsubstantiated disclosure Mr. Dalessandro was not the last man standing as he wanted to be, and finally, that Mr. Dalessandro was in any way injured by any such alleged disclosure as he entered into an agreement subsequently on terms that were acceptable to him.

C. Entitlement to Commission

The Plaintiffs argue that they are entitled to recover a full commission under the Agreement because the Defendants' wrongful termination denied them the opportunity to complete any future performance. In their opposition papers, the Defendants argue that the Plaintiffs are not entitled to damages because they cannot establish that they would have earned a commission "but for" the purported termination, and that the Agreement conditioned recovery of a commission on entry of a contract of sale for the Property during the term of the Agreement, whereas, here, the contract of sale was entered after the term expired.

The Defendants rely on Section 4 of the Agreement, which states that Defendants would earn no commission if "for any reason whatsoever, including but not limited to, the acts, omissions, negligence or willful default of [503 West] … a Contract shall not be entered into between 503 and Related before the term of the Agreement expired" (NYSCEF Doc. No. 104, ¶ 4). Inasmuch as this Section precludes recovery of a commission even in the event of "willful default" by 503 West, it must be read in the context of the entire Agreement, which also provides that before a termination can be made, 503 West must provide the Plaintiffs with notice and a 10 day opportunity to cure. In other words, Section 4 cannot exclude the express requirements for a valid termination set forth in Section 1 as such an interpretation would render Section 1 meaningless (*American Exp. Bank Ltd v Uniroyal, Inc.*, 164 AD2d 275 [1st Dept 1990] [contract must be read to give full meaning and effect to all of its provisions]).

The general rule for a broker's recovery of a commission is that the broker must be the "procuring cause" of the transaction (*SPRE Realty, Ltd. v Dienst*, 119 AD3d 93, 97-98 [1st Dept

2014]). To be entitled to a commission, there must be a direct and proximate link between the broker's actions and consummation of the transaction (*id.*). However, a principal may not terminate the broker's authority in bad faith merely to escape payment of the broker's commission (*Aegis Prop. Servs. Corp. v Hotel Empire Corp.*, 106 AD2d 66, 75 [1st Dept 1985], citing *Sibbald v Bethlehem Iron Co.*, 83 NY 378, 385 [1881]; *Werner v Katal Country Club*, 234 AD2d 659 [1996]).

Here, an issue of fact exists as to whether the Plaintiffs would have been able to procure merely a term sheet or the contract within the term had the Plaintiffs not been prevented from doing so by the Defendants' wrongful termination, and whether the Plaintiffs may be entitled to a full commission or a half commission in accordance with the terms of the Agreement. This is an issue for the trier of fact and not something that can be resolved on the present record.

Accordingly, the Plaintiff's motion for summary judgment on its first cause of action for wrongful termination is granted solely to the extent that the Plaintiff has established the existence of a valid Agreement, their performance and the Defendants' wrongful breach and causation. Damages remain an issue of fact for trial.

II. Motion Sequence 005 (Defendant's Motion for Summary Judgment)

A. Wrongful Termination (First Cause of Action)

For the reasons set forth above, the branch of the Defendants' motion for summary judgment to dismiss the first cause of action for wrongful termination is denied.

B. Anticipatory Breach (Second Cause of Action)

As an initial matter, inasmuch as the Defendants argue that the Plaintiffs' claim for anticipatory breach should be dismissed because neither the Termination Email nor the Do Not Contact Me Email repudiated the Agreement and that the Plaintiffs' cannot establish that they would have earned a commission "but for" their purported termination, this argument is wholly without merit for all the reasons set forth above.

Although a contract between a broker and a principal is typically viewed as a unilateral contract, and, thus, not subject to the doctrine of anticipatory breach (*see Acacia Natl. Life Ins. Co. v Kay Jewelers*, 203 AD2d 40 [1st Dept 1994], citing *Long Is. R.R. v Northville Inds*., 41 NY2d 455, 463 [1977]; also, *Chiapparelli v Baker, Kellogg, & Co.*, 252 NY 192, 200 [1929], the Agreement at bar is not a typical contract between a broker and a principal in which the principal makes an offer in the form of a promise to pay the broker a commission in consideration of the broker's production of a ready, willing and able buyer (*see Curtis Prop. Corp. v Greif Co.*, 212 AD2d 259 [1995]). Here, the Agreement identified a specific buyer, i.e., the Designated Purchaser, and Mr. Della Valle's task was not to produce a buyer, but to advise the Defendants on the purchase and to negotiate a specific deal, which he did through his specific efforts on the Defendants' behalf. In other words, the obligations of the Agreement were mutual as performance was due on both sides.

By sending the Termination Email and the Do Not Contact Me Email, the Defendants anticipatorily breached the Agreement by summarily terminating the Plaintiffs' bargained-for engagement and depriving them of their right to cure any alleged default. Simply put, Mr.

Dalessandro sent the Termination Email and the Do Not Contact Me Email as a pretext at the moment that Mr. Della Valle indicated the other properties were acquired and that the Designated Purchaser would now come forward and make an acceptable offer, including the 1031 exchange property previously discussed in the 2014 LOI.

The anticipatory repudiation doctrine is applicable to contracts such as the Agreement that contemplate some future performance by the non-breaching party (*American List Corp. v US News and World Report, Inc.,* 75 NY2d 38 [1989]). As the Court of Appeals has held, under this doctrine, "a wrongful repudiation of the contract by one party before the time for performance entitle[s] the nonrepudiating party to immediately claim damages for a total breach" and the nonrepudiating party need not tender performance nor prove its ability to perform the contract in the future (*id.* at 44). Rather, the nonrepudiating party is relieved of its obligation of future performance and entitled to "recover the present value of its damages from the repudiating party's breach of the total contract" (*id.*). Accordingly, the Defendants' motion for summary judgment dismissal of this cause of action is denied.

C. Breach of the Implied Covenant of Good Faith and Fair Dealing and Promissory Estoppel (Third and Sixth Causes of Action)

The branch of the Defendants' motion for summary judgment on the third and sixth causes of action for breach of the implied covenant of good faith and fair dealing and promissory estoppel is granted because the Plaintiffs state in their opposition papers that they "do not press their third and sixth causes of action" and they offer no substantive arguments in opposition to dismissal of these claims (NYSCEF Doc. No. 177, at 9, fn 4).

D. Unjust Enrichment and Quantum Meruit (Fourth and Fifth Causes of Action)

A valid and enforceable written contract precludes recovery under quasi-contract when both claims arise from the same subject matter (*Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382, 388 [1987]). Here, there is an enforceable written Agreement which specifies the conditions under which commission is due and the amount of the commission. Although the Plaintiffs dispute which provisions of the Agreement should apply, recovery of a commission is nonetheless governed by the Agreement and the Plaintiffs are therefore precluded from asserting claims in unjust enrichment and quantum meruit for the recovery of unpaid commission (*see Orenstein v Brum*, 27 AD3d 352, 353 [1st Dept 2006]). Accordingly, the branch of the Defendants' motion for summary judgment to dismiss the fourth and fifth causes of action for unjust enrichment and quantum meruit is granted.

E. Claims Against Mr. Dalessandro Individually

The Defendants argue that the Plaintiffs cannot sustain their claims against Mr. Dalessandro personally because the Plaintiffs cannot meet their legal burden to pierce the corporate veil of 503 West and that Mr. Dalessandro's only purported wrong was to further a breach of the Agreement, which does not warrant piercing of the corporate veil. The Court agrees.

Piercing the corporate veil requires a showing that (1) an officer exercised complete domination over the corporation, and (2) that such domination was used to commit a fraud or wrong that resulted in injury (*Sheridan Broadcasting Corp. v Small*, 19 AD3d 331, 332 [1st Dept 2005]). However, a simple breach of contract, without either fraud or malfeasance, does not constitute

the type of wrong that warrants the piercing of the corporate veil (*Skanska USA Bldg. Inc. v Atl. Yards B2 Owner, LLC*, 146 AD3d 1, 13 [1st Dept 2016]).

Here, Mr. Dalessandro's purported wrongdoing involved sending the Termination Email and the Do Not Contact Me Email on behalf of 305 West, which ultimately terminated the Agreement. However, as the President of 305 West, Mr. Dalessandro could certainly send emails and take action on behalf of the company so long as he did not otherwise act in disregard of corporate formalities. The Plaintiffs fail to raise any material issue of fact in their opposition papers as to how Mr. Dalessandro's actions were anything more than a simple breach of the Agreement by 503 West (*id.*). Accordingly, the branch of the Defendants' motion for summary judgment to dismiss the claims against Mr. Dalessandro in his individual capacity is granted.

Accordingly, it is

ORDERED that the Plaintiffs' motion for summary judgment (Mtn. Seq. No. 004) regarding wrongful termination (first cause of action) is granted in part as set forth herein; and it is further

ORDERED that the Defendants' motion for summary judgment (Mtn. Seq. No. 005) is granted to the extent that the Plaintiffs' third (breach of the implied covenant of good faith and fair dealing), fourth (unjust enrichment), fifth (quantum meruit), sixth (promissory estoppel) causes of action, and all claims against Mr. Dalessandro personally are dismissed, and it is further

ORDERED that the Clerk is directed to enter judgment accordingly and to amend the Caption to reflect Mr. Dalessandro's dismissal as a defendant in this action.

20200714115143ABORROK5E2F63BD42DD4EFE82E82CBFFBD8CFDA

7/14/2020
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE